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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

| | | |
|----------------------|---|------------------------|
| In re |) | Case No. 08-17578-B-13 |
| Bryan M. Thissen and |) | DC No. MHM-1 |
| Gisele Thissen, |) | |
| Debtors. |) | |

**MEMORANDUM DECISION REGARDING TRUSTEE'S OBJECTION
TO CONFIRMATION OF CHAPTER 13 PLAN**

Michael H. Meyer, Esq., appeared in his capacity as the chapter 13 trustee (the "Trustee").

Peter L. Fear, Esq., appeared on behalf of the debtors, Bryan M. Thissen and Gisele Thissen (the "Debtors").

The Trustee objects to confirmation of the Debtors' chapter 13 plan (the "Plan") on the grounds that the Debtors have miscalculated the amount of disposable income which must be paid to unsecured creditors (the "Objection"). There are no disputed issues of fact. This decision turns upon the statutory construction of 11 U.S.C. § 707(b)(2)(A)(iii)(I), which allows the Debtors to deduct from their gross income payments "contractually due to secured creditors." The fair market value of the Debtors' residence is less than the amount owed to the holder of the first trust deed. The Debtors want to deduct from their gross monthly income the payments they had been making to the holders of two wholly unsecured junior trust deeds. For the reasons set forth below, the Objection will be sustained.

1 This memorandum contains findings of fact and conclusions of law required by
2 Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. The
3 court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and 11 U.S.C. § 1325¹
4 and General Orders 182 and 330 of the U.S. District Court for the Eastern District of
5 California. This is a core proceeding as defined in 28 U.S.C. §157(b)(2)(L).

6 **Background and Findings of Fact.**

7 Bryan and Gisele Thiessen filed their chapter 13 petition on November 21, 2008.
8 With their petition, they filed the required schedules of assets and liabilities. Schedule A,
9 for real property, shows ownership of a single family residence located on North Sandrini
10 Avenue in Fresno (the "Residence"). Schedule D, for secured claims, shows that the
11 Residence is subject to a first deed of trust in favor of Countrywide Home Loans
12 ("Countrywide") in the amount of \$417,000. The Residence is also subject to a junior
13 deed of trust in favor of JPMorgan Chase, formerly Washington Mutual Bank ("Chase")
14 in the amount of \$110,886.30, and another junior deed of trust in favor of GE Money
15 Bank/Green Tree ("Green Tree") in the amount \$40,159.93 (the "Junior Trust Deeds").²
16 Schedule A shows the Residence as having a value of \$300,000, which is less than the
17 amount owed to Countrywide secured by the first deed of trust.

18 With their petition, the Debtors also filed Official Form 22C entitled "Chapter 13
19 Statement of Current Monthly Income and Calculation of Commitment Period and
20

21 ¹Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy
22 Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-
23 9036, as enacted and promulgated *after* October 17, 2005, the effective date of The Bankruptcy
24 Abuse Prevention and Consumer Protection Act of 2005, Publ. L. 109-8, Apr. 0, 2005, 119 Stat.
23.

25 ²The Debtors' schedules are substantially accurate. Countrywide Home Loans Servicing,
26 L.P., filed a proof of secured claim in the amount of \$419,645.63 on January 15, 2009.
27 JPMorgan Chase has filed a proof of claim in the amount of \$113,497.35 and GE Money
28 Bank/Green Tree filed a proof of claim in the amount of \$41,280.07. The schedules do not
disclose which Junior Trust Deed was recorded in which order of priority. Since they both
appear to be wholly unsecured, their priority is not relevant to this decision.

1 Disposable Income” (“Form 22C”). Form 22C is also referred to generally as Form B22C
 2 or the Means Test. In chapter 13, Form 22C is used to calculate, *inter alia*, how many
 3 years a debtor must pay into a chapter 13 plan (the “applicable commitment period”), and
 4 how much “disposable income” a debtor must pay to his/her unsecured creditors over the
 5 term of the plan. Those calculations are based upon the debtor’s pre-petition current
 6 monthly income (“CMI”) and allowable deductions. On Form 22C, lines 14, 15 and 16
 7 show that the Debtors’ CMI is \$19,005.18. Their annualized CMI is \$228,062.16, which
 8 is substantially greater than the median family income applicable to the Debtors in
 9 California. The “applicable commitment period” for their chapter 13 Plan is therefore
 10 five years and their “disposable income” for purposes of confirming the Plan must be
 11 determined under § 1325(b)(3).

12 Part IV of Form 22C is designed to calculate disposable income under
 13 § 1325(b)(3). In Part IV, the Debtors are permitted to take deductions from their CMI
 14 pursuant to Internal Revenue Service standards and other necessary expenses. Sub-part C
 15 is entitled “Deductions for Debt Payment.” Line 47 has a space for listing “Future
 16 Payments on Secured Claims.” The preamble to line 47 defines the payments that can be
 17 listed on line 47 in pertinent part:

18 For each of your debts that is *secured by an interest in property* that
 19 you own, list the name of creditor, identify the property *securing the*
 20 debt, state the Average Monthly Payment, and check whether the
 21 payment includes taxes or insurance. The Average Monthly
 Payment is the total of all amounts *scheduled as contractually due to*
each Secured Creditor in the 60 months following the filing of the
 bankruptcy case, divided by 60. . . . (Emphasis added.)

22 On line 47 of Sub-part C, the Debtors deducted a payment to Countrywide for the
 23 first mortgage on their Residence in the amount of \$3,439.08. They also deducted
 24 payments to Chase and Green Tree on their Junior Trust Deeds in the amounts of \$974.04
 25 and \$384.39, respectively for a total of \$1,358.43. At the end of Part IV, line 52, the
 26 Debtors claim “Total of all deductions from income” in the amount of \$15,953.62. On
 27 line 56, the Debtors also claim a “Qualified retirement deduction” in the amount of
 28 \$2,540.50. After taking these deductions, the Debtors report on line 59 that their

1 “Monthly Disposable Income” is \$511.06.

2 The Plan incorporates the calculation of monthly disposable income from Form
3 22C. At Section 1 of the Plan, the Debtors indicate that because “annualized current
4 monthly income is greater than applicable median family income, projected monthly
5 disposable monthly income [is taken] from Line 59 [of Form 22C].” As referenced
6 above, this is stated to be \$511.06. Multiplying this by the required 60-month
7 commitment period gives a “projected disposable income” over the life of the Plan in the
8 amount of \$30,663.60.

9 The Trustee objects to the Debtors’ calculation of disposable income because it
10 includes deductions for payments relating to the two Junior Trust Deeds. He contends
11 that the “projected disposable income” should be \$1,869.49 per month, which calculates
12 over the 60-month “applicable commitment period” to \$111,425.40.

13 If the Green Tree and Washington Mutual payment is [sic] not
14 deducted in Line 47, then the Monthly Disposable Income on Line
15 59 is \$1,869.49, which over 60 months would yield for the unsecured
creditor(s) the sum of \$111,425.40. ($\$709.61 \times 60 = \$112,169.40 -$
 $\$744.00$ (attorney fees) = \$111,425.40). (Trustee’s Objection at p.2.)

16 The Plan provides for monthly payments to the Trustee in the amount of \$1,200
17 over the 60-month commitment period.³ The Plan at paragraph 3.20 (Class 7) provides
18 that general unsecured claims will receive a 15% dividend on their allowed claims.
19 General unsecured creditors are defined in paragraph 3.20 to mean claims “that are *not*
20 *secured* by property belonging to Debtor, . . . including the under-collateralized portion of
21 secured claims not entitled to priority.” (Emphasis added.) The Plan shows at paragraph
22 3.20 that the Debtors expect their general unsecured claims to be approximately
23 \$242,772.71, which includes all of the “unsecured debt” owed on the Junior Trust Deeds.⁴

25 ³Not all of the monthly payment goes to the unsecured creditors. The unsecured creditors
26 must receive the “projected disposable income.” The monthly payment includes payments for
the Debtors’ automobile in the amount of \$462.18 and the Trustee’s fees.

27 ⁴The Debtors’ Schedule F lists general unsecured claims totaling \$91,726.48. The debt to
28 Chase and Green Tree are listed in Schedule D as \$110,886.30 and \$40,159.93, respectively.

1 The 15% dividend provided for in the Plan will result in a payment of \$36,415 to general
2 unsecured creditors. This is significantly less than the \$111,425.40, which the Trustee
3 contends general unsecured creditors should receive if the Junior Trust Deed payments
4 are not deducted on Form 22C, line 47.

5 The Debtors have filed two motions to value the Residence and determine the
6 secured status of the Junior Trust Deeds based on the well recognized authority of *Lam v.*
7 *Investors Thrift (In re Lam)*, 211 B.R. 36 9th Cir. BAP 1997) (the "Lam Motions"). In
8 support of each Motion, the Debtors filed a declaration stating that the Residence is worth
9 \$300,000, which is less than the senior lien to Countrywide. In both Motions, the Debtors
10 request an order that values the Residence "at \$300,000.00 for the purposes of treating the
11 claim of [Chase and Green Tree] as an unsecured claim in the Plan and for the purpose of
12 removing the lien of [Chase and Green Tree] pursuant to the decision of *In re Lam*"⁵

13 **Issue.**

14 The sole issue presented here is whether the Debtors may deduct on Form 22C,
15 line 47, for purposes of calculating projected disposable income, payments that were
16 contractually due to the holders of the wholly unsecured Junior Trust Deeds.

17 **The Applicable Law.**

18 Bankruptcy Code § 1325(b)(1) states in pertinent part that if the chapter 13 trustee
19 or an unsecured creditor objects to plan confirmation, then the court may not approve the
20 plan unless, as of the effective date of the plan, either unsecured creditors get paid in full
21 or:

22 ///

23 _____
24 These total \$242,772.71, the same figure used in paragraph 3.20 of the Plan.

25
26 ⁵Both Lam Motions were heard on the same calendar with this Objection. Neither Lam
27 Motion was opposed by the affected creditor and both Motions were granted, subject to the
28 Debtors' ability to confirm a Plan, upon the court's finding that the Junior Trust Deeds are
wholly unsecured. In lieu of opposing the Lam Motion, Chase filed a joinder to the Trustee's
Objection.

[T]he plan provides that all of the debtor's *projected disposable income* to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors under the plan. § 1325(b)(1)(B) (emphasis added).

For a family with annualized CMI above the applicable median, the term “disposable income” is defined in §§ 1325(b)(2) & (3), which specifically incorporate the deductions allowed in § 707(b)(2):

(2) For purposes of this subsection, the term “disposable income” means current monthly income received by the debtor . . . less amounts reasonably necessary to be expended -

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor

(3) Amounts reasonably necessary to be expended under paragraph (2), . . . shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than - [the applicable median family income].

In this case, because the Debtors' annualized CMI is greater than the applicable median family income, their “reasonably necessary” deductions from income must be determined with reference to § 707(b)(2). The deduction of payments to “secured creditors” is allowed pursuant to § 707(b)(2)(A)(iii), which states in pertinent part:

The debtor's average monthly payments on account of *secured debts* shall be calculated as the sum of -

(I) the total of all amounts scheduled as *contractually due to secured creditors* in each month of the 60 months following the date of the petition. (Emphasis added.)

Analysis.

This decision turns upon the statutory construction of § 707(b)(2)(A)(iii)(I), which allows the Debtors to deduct from their gross monthly income payments “contractually due to secured creditors.” Resolution of a dispute over the meaning of a statute begins with the language of the statute itself. Where statutory language is plain, “the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms. . . . Courts must give meaning to every clause and

1 word of a statute. . . . *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 872 (9th
2 Cir. 2008) (citations omitted).

3 Under applicable Ninth Circuit law, if the Junior Trust Deeds are wholly
4 unsecured, they may be treated as general unsecured claims in the Plan. Thus, the
5 Debtors would not be required in their Plan to make regular mortgage payments to Chase
6 and Green Tree on account of their Junior Trust Deeds. See, *Zimmer v. PSB Lending*
7 *Corporation (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *In re Lam*, 211 B.R. at 36.
8 Indeed, as noted above, the Debtors' Plan already counts the debts attached to the Junior
9 Trust Deeds as general unsecured claims. (See footnote 4, supra.)

10 The distinction between a "secured" claim and an "unsecured" claim is defined in
11 § 506(a)(1) as follows:

12 An allowed claim of a creditor secured by a lien on property in
13 which the estate has an interest . . . is a secured claim to the extent of
14 the value of such creditor's interest in the estate's interest in such
15 property . . . and is an unsecured claim to the extent that the value of
such creditor's interest . . . is less than the amount of such allowed
claim. . . .

16 Section 506(a) applies in an individual bankruptcy case under chapter 13.
17 *Nobleman v. American Savings Bank*, 508 U.S. 324, 328, n.3, 113 S.Ct. 2106, 124
18 L.Ed.2d 228 (1993).

19 Section 707(b)(2)(A)(iii)(I) uses the term "secured creditors." The term "creditor"
20 is defined in § 101(10) as an "entity that has a claim against the debtor" The
21 statutory definition of "creditor" is intended to include "anyone holding a claim . . . unless
22 the express language or the context require additional qualifications to be met. Such
23 limitations may relate to the amount, nature or *security status* of the debt 2 *Collier*
24 *on Bankruptcy*, (15th Ed. Revised), § 101.10 at 101-74 (emphasis added). The term
25 "creditor" as used in § 707(b)(2)(A)(iii)(I) is specifically qualified by the term "secured."
26 By definition, the term "secured creditor" as used in § 707(b)(2)(A)(iii)(I) is analogous to
27 the holder of a "secured claim" as that term is defined in § 506(a)(1). A creditor cannot
28 be a "secured creditor" unless it holds a claim that is at least partially secured by some

1 property of the estate with some value.

2 The dispute here is over the meaning of the phrase “amounts scheduled as
3 contractually due to secured creditors.” The Trustee argues that because the value of the
4 Residence is less than the amount owed to the senior lienholder, Countrywide, then the
5 holders of the Junior Trust Deeds, Chase and Green Tree, are not “secured creditors”
6 within the meaning of subsection § 707(b)(2)(A)(iii)(I). The Trustee’s Objection is
7 bolstered by the fact that the Debtors have filed and successfully prosecuted the two Lam
8 Motions referred to above. (*See* footnote 5, *supra*.)⁶ The court finds this argument
9 persuasive. It is well settled in the Ninth Circuit that a totally unsecured mortgage against
10 real property is not a “secured claim” for any purpose in chapter 13. *In re Zimmer*, 313
11 F.3d at 1223. In *Zimmer*, the Ninth Circuit affirmed the rule first stated in *In re Lam*, that
12 a claim for repayment of a loan is not a “secured claim” where the creditor’s junior deed
13 of trust is totally unsecured. *Id.* “Under the Bankruptcy Code, ‘secured claim’ is thus a
14 term of art; not every claim that is secured by a lien on property will be considered a
15 “secured claim.”” *Id.* It follows then that the holder of a totally unsecured mortgage
16 against real property is not a “secured creditor” for any purpose in chapter 13 as well.

17 The Trustee supports his Objection with case law interpreting chapter 13 eligibility
18 under § 109(e). The Ninth Circuit considered the effect of undersecured debt on chapter
19 13 eligibility in *Scovis v. Henrichsen (In re Scovis)*, 249 F.3d 975 (9th Cir. 2001). In that
20 case, the Ninth Circuit held that the unsecured portion of an undersecured debt must be
21 counted as unsecured for purposes of chapter 13 eligibility under § 109(e). By analogy,
22 the Trustee argues that the unsecured portion of undersecured debt in chapter 13 should
23 also be treated as unsecured for the purposes of determining disposable income under
24 § 1325(b)(3).

25 The court declines the Trustee’s invitation to decide this issue based on principals

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27 ⁶The court is not suggesting here that a debtor must prosecute a Lam motion before the
28 junior lien on his property can be determined to be wholly unsecured. Generally, as here, the
inquiry regarding a creditor’s secured status should begin with the debtors’ schedules.

1 of chapter 13 eligibility. The term “secured claim” is defined by statute (§ 506(a)) and
2 the concept of a “secured creditor” has already been defined in the context of a wholly
3 unsecured mortgage by both the Bankruptcy Appellate Panel (*In re Lam*) and the Ninth
4 Circuit (*In re Zimmer*). The § 109(e) analogy is not necessary to support this decision.

5 The Debtors argue that the existence of the Junior Trust Deeds alone make Chase
6 and Green Tree “secured creditors” for purposes of calculating disposable income.
7 However, the BAP expressly rejected the “unsecured lien” theory in *Lam*.

8 An analysis of the state law “rights afforded a holder of an unsecured
9 “lien,” if such a situation exists, indicates these rights are empty
10 rights from a practical, if not a legal standpoint. A forced sale of the
11 property would not result in any financial return to the lienholder,
12 even if a forced sale could be accomplished where the lien attaches
13 to nothing. Nothing secures the “right” of the lienholder to continue
14 to receive monthly installment payments, to retain the lien until the
15 debt is paid off, or the right to accelerate the loan upon default, if
16 there is no security available to the lienholder to foreclose on in the
17 event the debtor fails to fulfill the contract payment obligations.

18 *In re Lam*, 211 B.R. at 40.

19 The Debtors also argue that the payments to Chase and Green Tree were
20 “contractually due” on the date the petition was filed. The Debtors cite bankruptcy court
21 cases that have allowed a deduction for payments contractually due at the commencement
22 of the case even though the collateral was subsequently surrendered through the chapter
23 13 plan. The court takes no issue with this argument - there appears to be no dispute that
24 Chase and Green Tree had valid enforceable contracts which called for “contractually
25 due” monthly payments. However, the Trustee’s Objection focuses on the term “to
26 secured creditors,” which immediately follows and modifies the term “contractually due.”
27 The Debtors cannot parse the statute and disregard the limiting effect of the term “to
28 secured creditors.” It does not matter what payments were “contractually due” (indeed
most of the Debtors’ debts were “contractually due” in one form or another) if those
payments were not due to “secured creditors.”

The Debtors argue, “the appropriate paradigm for considering what payments
should be deducted on line 47 of Form B22C (and line 42 of Form B22A) is the

1 'snapshot' versus 'forward-looking paradigm,'" citing the Ninth Circuit's recent decision
2 in *In re Kagenveama*, 541 F.3d 868 (Debtors' Memorandum of Points and Authorities at
3 pp. 5 & 6).⁷ However, the "snap-shot" analysis does not transform the Junior Trust Deeds
4 into "secured claims." As the BAP observed above in *In re Lam*, if the Residence had
5 been sold on the day the petition was filed, the date of the proposed snap-shot, there
6 would still have been nothing - not one penny - from that sale to pay Chase or Green
7 Tree. At the commencement of the case, the Junior Trust Deeds attached to nothing of
8 any value. *In re Lam*, 211 B.R. at 40.

9 Finally, the Debtors argue that the Trustee's interpretation of § 707(b)(2)(A)(iii)(I)
10 will lead to "absurd consequences" in chapter 7. A debtor in chapter 7 must file an
11 Official Form 22A, the chapter 7 "means test," which is similar to Form 22C. On Form
12 22A, a debtor must list payments due to secured creditors for purposes of determining
13 whether the case is an abuse of chapter 7 within the meaning of § 707(b)(1). The Debtors
14 here argue that the "chapter 7 abuse" question will turn on the valuation of collateral for
15 every listed secured claim, potentially transforming a summary proceeding into a morass
16 of litigation.

17 Again, the court declines the Debtors' invitation to journey beyond the scope of
18 the narrow issue presented here, whether the holder of a wholly unsecured mortgage can
19 be counted as a secured creditor for purposes of calculating a chapter 13 debtor's
20 disposable income. The potential chapter 7 issues are not before the court. Those issues

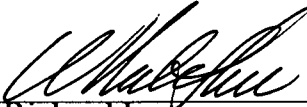
21
22 ⁷The Debtors cite two unpublished bankruptcy court decisions for the proposition that
23 Form 22C should be a "snap-shot" of their financial condition on the day they filed their petition
24 (*In re Allen*, 2008 WL 451053 (Bankr. D. Kan. 2008) and *In re Oliver*, 2006 WL 2086691
25 (Bankr. D. Or. 2006)). Neither of those cases are applicable here. They both relate to the
26 deduction for pre-petition car payments. In *Allen*, the creditor was partially secured and the
27 chapter 13 plan proposed to "cram-down" the claim to the value of the car. The car payments
28 through the plan would be significantly less than the payments that had been deducted on Form
22C. In *Oliver*, the debtors proposed to surrender their car in the confirmed plan and stop
making the payments they had deducted on Form 22C. In both of those cases, there was some
value to secure the creditors' claims. Here, there is no dispute that the Junior Trust Deeds are
wholly unsecured.

1 would properly be raised by the U.S. Trustee or a chapter 7 trustee who are not parties to
2 this proceeding. It would be inappropriate for this court to opine, or even suggest what
3 effect this ruling might have in a chapter 7.

4 **Conclusion.**

5 Based on the foregoing, the court is satisfied based on the Debtors' schedules and
6 the subsequent Lam Motions, that the Junior Trust Deeds are wholly unsecured. It
7 follows therefore that Chase and Green Tree, the holders of those Junior Trust Deeds, are
8 not "secured creditors" within the meaning of § 707(b)(2)(A)(iii)(I). The court concludes
9 that the Debtors may not deduct payments contractually due to holders of wholly
10 unsecured mortgages on Form 22C for purposes of determining the "projected disposable
11 income" which must be paid to unsecured creditors through their chapter 13 Plan. The
12 Trustee's Objection will be sustained.

13 Dated: February 12, 2009

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15 W. Richard Lee
16 United States Bankruptcy Judge
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